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No. 85-1630

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOWELL D. HEWITT, ET AL., PETITIONERS

v.

AARON HELMS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

Petitioners, officials of the Pennsylvania Department of Corrections, sought a Writ of Certiorari for this Court to review the decision of the Court of Appeals for the Third Circuit holding that Respondent, Aaron Helms, was a prevailing party within the meaning of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988. Helms v. Hewitt, 780 F.2d 367 (3rd Cir. 1986). The Court granted the Writ of Certiorari on June 16, 1986.

Respondent filed his Complaint on July 26, 1979, seeking damages and injunctive and declaratory relief. (J.A. 7a -21a). On August 12, 1979, Petitioners filed a Motion to Dismiss or, in the alternative, for summary judgment. On September 28, 1979, the magistrate recommended granting the Petitioners' Summary Judgment Motion. On November 7, 1979, the District Court declined to adopt the Magistrate's recommendation. On November 16, 1979, Defendants filed an

answer to the original Complaint. On May 12, 1980, Respondent filed his Motion for Summary Judgment. Petitioners, on May 27, 1980 filed a Cross Motion for Summary Judgment. On August 15, 1980, the District Court granted Summary Judgment for the Petitioners on the ground that it found that no violation of any right secured by the Constitution had occurred.

On June 30, 1981, the Circuit Court reversed the District Court's judgment and taxed costs in favor of Respondent. Helms v. Hewitt, 655 F.2d 487 (3rd Cir. 1981). The Petitioners petitioned for Writ of Certiorari on the issue of what process was due for administrative confinement. The Petitioners chose not to raise the unconstitutionality of their reliance on unidentified informants in their Petition. The Petition was granted by the Court on March 8, 1982, Hewitt v. Helms, 455 U.S. 999 (1982) and on February 22, 1983, the Court reversed the judgment of the

Circuit Court. Hewitt v. Helms, 459 U.S. 460 (1983). On remand from the Court, the Circuit Court concluded that its declaration as to the unconstitutionality of the practices of using unidentified informants was not affected by the Court's mandate. Hewitt v. Helms, 712 F.2d 488 (3rd Cir. 1983). The Circuit Court then remanded the case to the District Court to determine whether qualified immunity was applicable. Both Respondent and Petitioners filed Motions on the issue of qualified immunity and on February 3, 1984, the District Court denied Respondent's Motion and ruled in favor of the Petitioners. A second appeal to the Circuit Court followed wherein both parties challenged the District Court's judgment. During the pendency of this appeal the Bureau of Prisons promulgated regulations closely tracking the requirements set forth in the Circuit Court's holding relating to the unconstitutionality of the prison tribunal's use of information supplied by an

unidentified informant. (J.A. 101a - 102a). The Circuit Court subsequently affirmed the judgment of the District Court on August 21, 1984. On December 7, 1984, Respondent filed a Petition for Attorney's Fees with the District Court. After filing of Briefs by both parties, the District Court on March 14, 1985, entered an Order denying Respondent's Petition for Attorney's Fees. (Appendix, Petition for Certiorari, 27a - 40a). On his first appeal to the Circuit Court the Respondent specifically sought declaratory relief from the Circuit Court. The Petitioners' Brief on this first appeal does not indicate any argument with regard to declaratory relief being moot.

Respondent appealed the denial of attorney's fees to the Third Circuit and the Third Circuit reversed. (Pet. App. 3a - 26a); 780 F.2d 367 (1986). The Circuit Court held that Respondent was entitled to attorney's fees on either of two theories.

First, the Court ruled that Respondent had in fact obtained judicial relief, by virtue of the Circuit Court's declaration that Plaintiff's due process rights were violated by the state officials. The Circuit Court noted that this declaratory relief served not only to vindicate the Respondent's constitutional rights, but it served as a standard of conduct to guide prison officials in the future. (Pet. App. 18a - 19a). Second, the Circuit Court noted that the issuing of specific regulations by the Pennsylvania Bureau of Corrections which regulations established procedures in conformity with its holding, indicated that Respondent's suit may have acted as a catalyst for the state's adoption of the regulations. The Circuit Court, therefore, remanded the case to the District Court for a factual determination as to whether the litigation had been the catalyst for the procedural reform. (J.A. 85a - 116a; Pet. App. 21a - 24a). The Court of Appeals

specifically noted that the nature of Plaintiff's Complaint, which sought declaratory relief against the Petitioners in their official and individual capacities, "contemplated a modification of the treatment of all prisoners subject to disciplinary actions based on information obtained from confidential informants." (Pet. App. at 22a - 23a).

SUMMARY OF ARGUMENT

The circuit court correctly held that a civil rights Plaintiff succeeds on a significant issue in litigation when he vindicates his constitutional rights. In fact, for purposes of 42 U.S.C. Section 1988, by obtaining a ruling that his constitutional rights had been violated by state officials, a Plaintiff succeeds on the most significant issue in the litigation. The legislative history makes it abundantly clear that Section 1988 was designed for the express purpose of fostering the important congressional policy of having the constitution and federal laws protected by private actions. In private actions, the individual functions as a private attorney general and thereby vindicates not only his rights but the rights of all citizens. Respondent's action was an almost classic example of the proper functioning of the private attorney general concept. Respondent by vindicating his rights through declaratory relief vindi-

cated not only his own constitutional rights, but the rights of all other prisoners who have or would in the future be subject to Petitioner's procedures before prison tribunals. Respondents did this in a manner which caused the least possible intrusion into the state's management of its own affairs. Further, Respondent submits, as an evidentiary hearing will demonstrate, that the relief received by Respondent, in fact, caused the Petitioner to promulgate regulations in keeping with the specifications set forth by the circuit court.

There can be little argument that the circuit court had the power and properly did declare that Petitioner had violated Respondents' consititutional rights. This declaratory relief was entered in a suit where the Petitioners had specifically been sued in their official capacities for declaratory relief. This Court has consistently held that declaratory relief is

appropriate where there is an active case or controversy with regard to monetary relief. This Court has also recognized that attorney's fees are approriate even in situations involving absolute immunity for damages. The opinions of this Court are fully supported by the legislative history of Section 1988 which specifically indicate that Congress contemplated the awards of attorney's fees in situations where damages would be barred or limited by immunity doctrines, especially when the state officials have from the inception of the suit been sued in their official capacity for official acts.

The circuit court's opinion in keeping with the decisions of this Court, reflects a proper concept of federalism and the functioning of declaratory judgments where attorney's fees are awarded for declaratory relief. Unlike injunctive relief, declaratory relief is not coercive. Declaratory relief merely declares that the

state's procedures are unconstitutional. This declaration, barring change in the practices, will be exactly the same regardless of how often the practice has occurred or when it occurs. Because the actual relief received will be exactly the same, it would wasteful of the Court's and the party's resources and of no real benefit to require that attorney's fees only be awarded in class action or injunctive relief situations. Such an approach would not only significantly and unnecessarily burden the courts, but it would have the effect of requiring the federal courts to intrude to a far greater extent into the management of the state's affairs. Logic and reason coupled with the legislative purposes behind Section 1988 indicate that it would be perfectly fitting, if not highly desirable, to award attorney's fees for the declaratory relief entered in this case.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT HELMS WAS A PREVAILING PARTY ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

On July 26, 1979, Respondent brought suit against Petitioners in their official and individual capacities for violation of his constitutional right to due process. (J.A. 9a-10a) Respondent, among other remedies, asked the Court to declare that his constitutional right to due process was violated by his conviction by a prison tribunal on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. Respondent's complaint indicates strongly that not only did he seek to have Petitioners' policy declared unconstitutional, but this was a primary interest in bringing the litigation. The very first sentence of Respondent's request for relief states:

> Wherefore, Plaintiff prays this Honorable Court:
>
> 1. Enter a Declaratory Judgment, declaring Plaintiff's rights

> under the Fourteenth Amendment and 42 U.S.C. Section 1983 violated as more specifically set forth in this Complaint. (J.A. 19a)

The Respondent also sought damages and "such other relief, as may be necessary and proper." (J.A. 20a-21a) On his first appeal to the Third Circuit, Respondent continued to press for declaratory relief and specifically requested the same from the Circuit Court.

> Wherefore, Appellant prays this Court reverse the Judgment of the District Court; enter appropriate declaratory and injunctive relief on Appellant's behalf; order his misconduct conviction of January 22, 1979, expunged from any and all institutional, inmate, or bureau correction files, records, or jackets; and remand this case to the District Court for an appropriate award of monetary damages on his bahalf.

Brief of Appellant, Aaron Helms, Circuit Court No. 80-2393.[1]

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[1] In Petitioners' brief to the Third Circuit No. 80-2393, the Petitioners never raised or contested the ability of the Circuit Court to enter declaratory relief for the Respondent.

On the issue of Respondent's conviction on a misconduct charge when the only evidence against him was a hearsay recital by the charging officer on an uncorroborated report from an unidentified informant, the Circuit Court held:

> That a prisoner is denied due process when his conviction on disciplinary charges was based solely on a hearsay report of an unidentified informant's account which offers no basis for an independent assessment of an informant's credibility or reliability.

Helms v. Hewitt, 655 F.2d 487 at 504 (3rd Cir. 1981). This holding by the Circuit Court was a straightforward declaration in favor of Respondent that his constitutional right to due process was violated by his conviction on disciplinary charges based upon an unverified and unsubstantiated account of an unidentified informant. While Respondent's claim for damages was eventually dismissed, based upon qualified immunity, this dismissal had nothing to do with the declaration that his constitutional rights had been violated.

This dismissal only went to whether he was entitled to damages for the violation of his rights, and had no effect on the unconstitutionality of Petitioners' official acts. There can be little argument that some of the benefit which Respondent sought in bringing his suit was to have the practices of Petitioners with regard to convictions based upon unidentified informants declared unconstitutional. There also can be little argument that Petitioners' actions were declared unconstitutional. In fact, the Circuit Court set forth basic minimum procedures which the Institutional Hearing Committee must follow in order to provide minimum due process.

> We, therefore, hold that when a prison tribunal's determination is derived from an unidentified informant, the procedure approved in Gomes v. Travisono, must be followed to provide minimum due process.

Helms v. Hewitt, supra at 502. The Circuit Court went on to set forth specifically the types of

minimum procedures necessary making reference to the holding in Gomes v. Travisono, 510 F.2d 537 at 540 (1st Cir. 1974). This holding by the Circuit Court benefited not only the Respondent by specifically vindicating his constitutional rights, but it also vindicated the constitutional rights of those persons who in the future might be in the same situation as the Respondent. The holding, therefore, not only acted as a deterrent to future violations, but also set forth the standard which would allow the Petitioners to avoid future constitutional violations. Petitioners' actions, as well as their own regulations, demonstrate that they had no procedural requirements for the use of statements made by unidentified informants when these statements are being used by a prison tribunal to convict a prisoner of misconduct. Further, the state has vigorously argued throughout this entire litigation that the tribunal's use of the

statement of the unidentified informant for conviction was not unconstitutional.[2] In contrast, the Petitioner's present regulations contain over one-half of a page of detailed procedural requirements for the use of information obtained from a confidential informant. (J.A. 101a-102a) These regulations were promulgated during the pendency of Respondent's second appeal to the Third Circuit and prior to the affirmance by the Third Circuit of the District Court's holding.

Despite the fact that Respondent specifically sought and received a vindication of his constitutional rights and despite the fact that the Petitioners, in fact, enacted regulations in keeping with the holding of the Third Circuit,

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[2]In fact, the Attorney General still attempts to contest the Third Circuit's holding. Brief for Petitioners, page 37. However, the Circuit Court's ruling on this matter is final and to the extent the Attorney General wished to contest this matter, he should have done this on his Petition for Certiorari to this Court. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 at 1981 n. 22 (1984).

the Petitioners assert that awarding counsel fees in this case would conflict with the purposes of 42 U.S.C. Section 1988. By virtue of the Circuit Court's ruling, Respondent succeeded on not only a significant issue but the most significant issue in the case and attained the clear benefit of having his constitutional rights vindicated--a vindication of rights, which 42 U.S.C. Section 1988 was expressly designed to promote. The Circuit court was, therefore, correct in finding that Respondent was a prevailing party for purposes of awarding attorney's fees.

II. THE CIRCUIT COURT'S HOLDING IS FULLY IN KEEPING WITH THE PURPOSES BEHIND SECTION 1988 AND THE DEFINITION OF PREVAILING PARTY STATUS EMBODIED IN SECTION 1988'S LEGISLATIVE HISTORY AND THE APPLICABLE CASE LAW.

As the Circuit Court quite properly noted, the focus of Section 1988 was not upon damage awards or remedies but upon making sure that individuals had access to the courts for purposes of vindicating the most fundamental rights guaranteed by our Constitution and laws.

> Private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

1976 U.S. Code Cong. & Ad. News 5910; S. Rep. No. 1011, 94th Cong. 2nd Sess. (1976) (emphasis added). Such a vindication occurs when "a party has prevailed on an important matter in the course of litigation." Id. at 5912. The Senate report further states:

> Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when

> they vindicate rights...without formally obtaining relief.

Id. at 5912 (emphasis added). The House Report was fully in accord with the Senate Report's focus upon the vindication of constitutional rights and specifically states:

> [W]hile damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses available only to public officials, preclude or severely limit damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal, Civil, and Constitutional rights are to be adequately protected.

H.R. Rep. No. 941558 p. 9 (1976). This Court has in two recent decisions made specific reference to the above-cited portion of the House Report. Pulliam v. Allen, 466 U.S. 522, 104 S.Ct. 1970 at 1982 (1984); City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686, 2696 (1986). The simple reading of the passages quoted earlier

from the Senate and House Reports make it abundantly clear that the focus of Section 1988 is the "vindication" of rights even in situations where immunity doctrines apply. The thrust of the legislative history behind Section 1988 is to award attorney's fees to the individual who by vindicating his constitutional rights has fulfilled a policy that Congress considered of the highest importance. Despite the Petitioners' assertions otherwise, the cases cited in the Senate Report bear out the fact that the focus of Section 1988 was not upon monetary damages or formal relief but upon the vindication of important rights and congressional policies which vindication ultimately inures to the benefit of society as a whole.

Awarding attorney's fees in the present case is fully in keeping with the definition of prevailing parties as set forth by the various circuits.

One of the most common standards for finding prevailing party status is that:

> The party is a "prevailing party" under this section if he or she succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In the present case, it strains credulity to argue that the constitutionality of the prison tribunal's decision making process was not a significant issue in this litigation. It is also a rather callous appraisal of the case to suggest that the vindication of one's constitutional rights is not a benefit and in fact a benefit specifically requested and received in the present case. As noted by one court where the plaintiff has prevailed by establishing a right "secured by the constitution", (42 U.S.C. Section 1983), Section 1988 contemplates the award of attorney's fees.

> By its expressed terms, Section 1988 authorizes an award to the prevailing

> party "in any action...to enforce a provision" of Section 1983.

Solomon v. City of Gainesville, 796 F.2d 1464 at 1466 (11th Cir. 1986); see Mantolete v. Bolger, 791 F.2d 784 (9th Cir. 1986); Rivera v. City of Riverside, 763 F.2d 1580, 1582 (9th Cir. 1985), affirmed City of Riverside v. Rivera, _____ U.S. _____, 106 S.Ct. 2686 (1986); Fast v. School Dist. of City of Ladue, 728 F.2d 1030, 1033-34 (8th Cir. 1984) (en banc). A review of some of these cases will indicate the basis of these holdings and how this approach comports with the legislative history of Section 1988.

In Coalition for Basic Human Needs v. King, 691 F.2d 597 (1st Cir. 1982), plaintiffs sought to have the District Court compel state officials to resume AFDC payments which had been suspended because of a legislative battle over the state budget. The District Court denied a temporary restraining order but on appeal the Circuit Court granted an injuction pending appeal. A budget was subsequently passed prior to the effective date of

the Circuit Court's injunction. The Circuit Court allowed attorney's fees even though the injunction never went into effect based on the fact that some of the benefits sought was to obtain preliminary relief and that by obtaining this relief the plaintiffs had succeeded on a significant issue of litigation. In so holding, the First Circuit took specific note of the case of Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980) (per curiam), cert. denied, 450 U.S. 1012 (1981), where the Court awarded attorney's fees in a situation where the District Court preliminarily enjoined certain police procedures following a judicial determination of unconstitutionality even though the case had been mooted before the police could complete an appeal of the injunction. The First Circuit noted that attorney's fees were even more appropriate in King since the success on the significant issue had occurred at an appellate level. In the present case, the success on the

significant issue not only occurred at the appellate level but the Attorney General consciously chose not to contest the Third Circuit's holding in their Petition for Certiorari to this Court.

In Solomon v. City of Gainesville, supra, an individual brought an action under 42. U.S.C. Section 1983 seeking declaratory and injunctive relief. The District Court entered summary judgment for the defendants, however, the Circuit court on appeal declared that the City Sign Ordinance violated plaintiff's first amended rights. While no formal declaratory judgment was entered and Solomon waived his Section 1983 damages claim on appeal, the Circuit Court held that Solomon was a prevailing party because he had on appeal established a right secured by the Constitution. Id. at 1466. See Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir. 1985).

In Fast v. School Dist. of City of Ladue, supra, 1033-34 (8th Cir. 1984) (en banc), the

teacher brought a suit, individually, claiming that she was constitutionally entitled to a pre-termination hearing. Id. at 1031. The District Court rejected plaintiff's claim but declared that defendants had violated plaintiff's due process rights and that plaintiff was entitled to a post-layoff hearing. Id. at 1033. The plaintiff had no interest in such a hearing and, therefore, did not avail herself of it. The District Court, however, denied attorney's fees and the plaintiff appealed. The Eighth Circuit in reversing the District Court stated:

> Furthermore, even if the Complaint is read not to request a post-layoff hearing, the District Court held that the Plaintiff was entitled to such a procedure and the failure to afford it was unconstitutional.
>
> ...
>
> The relief secured here was not insignificant. First of all, the simple holding that the board has deprived Plaintiff of her property without due process of law, in and of itself, is an important vindication of constitutional rights. When public officials violate the rights of citizens, and courts so declare, an important deterrent effect results. Other public officials are less likely to violate

> other citizens' rights in the future. The specific relief obtained, in addition, tends quite substantially to reduce the likelihood of future arbitrary conduct by public employers.

Id. at 1033. What the Eighth Circuit quite properly realized was that the very practical results and benefits of having actions declared unconstitutional:

> ...is that a standard of conduct is laid down which will in the future benefit all persons in a situation similar to Plaintiff's.

Id. at 1034. As one Court noted, given this very important purpose of having constitutional rights declared:

> The award of counsel fees is not intended to punish the Defendant in any way. Rather, it is to permit and encourage Plaintiffs to enforce their civil rights. To declare those rights while simultaneously denying the award of fees would seriously undermine the declared congressional policy.

Perez v. University of Puerto Rico, 600 F.2d 1 at 2 (1st Cir. 1979). In fact, the vindication of

fundamental rights is not only a significant issue, but the most significant issue in the litigation in light of the congressional policy behind the award of attorney's fees. As noted by one court in awarding attorney's fees, plaintiffs:

> "succeeded on the most significant issue of the litigation--they proved that their civil rights had been violated..."

Rivera v. City of Riverside, 763 F.2d 1580 at 1582 (9th Cir. 1985), aff'd. City of Riverside v. Rivera, supra.

The approach of the Circuit Courts in the above opinions is further supported by the cases cited in the legislative history of Section 1988. The Senate Report cited Mills v. Electric AutoLite Company, 396 U.S. 375 (1970) for the proposition that attorney's fees are appropriate where a party has prevailed on an important matter in the course of litigation. In Mills, this Court held that attorney's fees were appropriate where a plaintiff succeeded in establishing a cause of action even

though the plaintiff may ultimately not be entitled to any relief. This Court made the following statement in support of its holding:

> Nevertheless, the stress placed by Congress on the importance of fair and informed corporate sufferage leads to the conclusion that, in vindicating the statutory policy, Petitioners have rendered a substantial service to the corporation and its shareholders.

Id. at 397. As discussed earlier, the stress by Congress and the legislative history was upon the vindication of basic federal, constitutional, and statutory rights and the benefit which inures to all citizens from the vindication of these rights. As noted by this Court in a very apt quotation:

> "If a citizen does not have resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney).

City of Riverside v. Rivera, supra, 106 S.Ct. at 2695. It would be an interesting commentary on

the values of our congressional policies were we to be so readily willing to recognize the importance of awarding attorney's fees for the vindication of congressional policy for fair and informed corporate sufferage but not willing to recognize the award of counsel fees for the vindication of fundamental constitutional rights which benefit not shareholders but society as a whole.

In support of their statement that a party may prevail when they "vindicate rights" without formally obtaining relief, the legislative history cites numerous cases. Among these cases is Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969). In Richards plaintiff brought a claim under Title VII for sex discrimination. The defendant, not by choice, but because of state regulations, could not hire a woman for the job which she sought. Because the employer acted in good faith reliance upon a state regulation, the

Court found that it could not award relief. The Court found, however, that the plaintiff should be entitled to attorney's fees for establishing a violation of the act. Again, as in Mills, fees are awarded not for formal relief but because of the vindication of the statutory policy. While Petitioners suggest that other cited cases such as Kopet v. Esquire Realty Co., 523 F.2d 1005 (2nd Cir. 1975) and Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970) should be limited to the fact that they conferred a benefit upon a class, there is absolutely nothing in the legislative history which indicates that they were in any way being cited for this proposition. The sentence which they are cited in support of reads as follows: "Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." Rather, these cases reflect the intent

of Congress to indicate that under Section 1988, just as under other areas of federal law involved in the cited cases, attorney's fees should be awarded for the vindication of the rights expressed in the congressional policy even though no formal relief has been obtained. The Kopet Court, after discussing this Court's holding in Mills, stated:

> Here, similarly, it appears that appellant rendered a service to the partnership by vindicating the statutory policy against unregistered offerings. Esquire benefited from appellant's action both in arresting the existing violation of the law and in the deterrent effect which it may be assumed the action will have on the future conduct of Esquire management.

Kopet v. Esquire Realty Co., supra at 1008. Paraphrasing the above quote it could be said in the present case that here, similarly, it appears that the Respondent rendered a service to the state by vindicating the statutory policy against the deprivation of due process rights. The state

benefited from Respondent's action both in arresting an existing violation of the Constitution and in the deterrent effect which it may be assumed the action will have on the future conduct of the state officials. The thrust of all these cases, including those cited in the legislative history is the vindication of statutory rights which Congress has expressly stated are of importance. Vindication of these rights by the individual furthers an imporant congressional policy and Congress has, therefore, determined that it is appropriate to award attorney's fees even where the rights have been vindicated without formally obtaining relief.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE PRESENT CASE SHOULD BE REMANDED FOR DETERMINATION OF WHETHER RESPONDENT'S LAWSUIT WAS A CATALYST IN CAUSING THE PETITIONERS' UNCONSTITUTIONAL PRACTICES TO CHANGE.

As the Third Circuit correctly noted in its Opinion, attorney's fees may be awarded where the plaintiff's lawsuits acts as a catalyst which causes changes in the defendant's past practices even though no direct relief was obtained. Even where a party has received no judicial relief, Fields v. City of Tarpon Springs, Fla., 721 F.2d 318 (11th Cir. 1983); Rutherford v. Pitchess, 713 F.2d 1416 (9th Cir. 1983), or different relief than that requested in the complaint, Institutionalized Juveniles v. Sec. of Pub. Wel., 758 F.2d 897 (3rd Cir. 1985); Fast v. School Dist. of City of Ladue, supra, a plaintiff may be considered to have prevailed for purposes of Section 1988.

> Under Section 1988, the focus is on the relief received rather than any formal procedural labels.

Morrison v. Ayoob, 627 F.2d 669 at 671 (3rd Cir. 1980). In determining whether a party is prevailing:

> The focus of this analysis is on the relief actually obtained rather than on the success of legal theories.

Institutionalized Juveniles v. Sec. Publ. Wel., supra at 911.

In Fields v. City of Tarpon Springs, Fla., supra, plaintiffs brought a suit claiming that the city racially discriminated in capital expenditures for city parks. The federal agency involved in funding conducted an investigation and specifically found no racial discrimination. Plaintiffs subsequently voluntarily dismissed their complaint but requested attorney's fees because the parks in minority areas had, in fact, changed. The District Court after an extensive hearing awarded attorney's fees. The Eleventh Circuit, in upholding the District Court, focused upon the necessity of looking to the practical

relief obtained and not whether the issue of discrimination was litigated or compromised. The Court stated:

> ...that a requisite causal connection is gauged by the "nature of the relief obtained, the chronology of events and the role of the civil rights action in activating the change." Robinson v. Kimbrough, 652 F.2d 458 at 466 (5th Cir. 1984).

Fields v. City of Tarpon Springs, Fla., supra at 321. The Fields Court noted that while there had been no compromise, settlement or legal determination, other than the federal agency determination which was favorable to the defendants, the parks had, in fact, changed after the filing of the lawsuit. The Court, therefore, upheld the award of attorney's fees stating:

> The catalyst test for fees only requires a causal connection between the lawsuit and some actual changes effected.

Id. at 322. In so holding, the Eleventh Circuit recognized that the purposes of the Civil Rights Act can only be served if fees are awarded when

"practical relief has been obtained that is factually a causal result of the lawsuit." Id. at 321.

In Rutherford v. Pitchess, supra, the plaintiff had received an earlier order requiring jail officials to make constitutional improvements. Subsequently, plaintiff brought an action for contempt sanctions and modification of the earlier decree. The Court denied plaintiff's contempt and modification motions and, in fact, granted defendant's modification motion. Plaintiff then filed a motion seeking attorney's fees for work done on the contempt and the modification proceedings. While the Court found that plaintiff was not entitled to any of their requested relief, the Court found that the bringing of the contempt motion had an impact on defendant's subsequent good faith compliance with the earlier judgment. The Ninth Circuit, just as the Eleventh Circuit, focused on the practical

result of the plaintiff's action and not his entitlement to relief.

> ...[P]laintiffs were entitled to attorney's fees under Section 1988 because of the causal relationship between the litigation brought and the practical outcome realized.

Id. at 420. The Ninth Circuit, just as the Eleventh Circuit, recognized that causation of a practical result, not formal relief or a judicially determined entitlement, must be a key factor in determining whether to award attorney's fees if civil rights are to be meaningly enforced. See also Gekas v. Atty. Registration and Disciplinary Com'm., 793 F.2d 846, 851 (7th Cir. 1986) (no showing of any judicial relief or entitlement in federal court but lawsuit found to be causally linked to advancement of already planned state action); Ridgeway v. Montana High School Ass'n., 638 F.Supp. 326 (D. Mont. 1986). (The only claim pressed by the plaintiff was that of the discriminatory scheduling of sports.

Attorney's fees had been previously awarded based on a consent decree which dealt with the general discriminatory policy of the high school systems. The Court found that there was no showing of discriminatory scheduling. It also found that there generally still existed discriminatory treatment of female sports. Despite the failure of plaintiffs on their specific claims pressed, the Court awarded fees because the plaintiffs had in fact succeeded on the general thrust of their claim.)

Again, the approach of the above Circuit Courts, including the Circuit Court below, is strongly supported by the cases cited in the legislative history of Section 1988. In Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir. 1970), the plaintiffs brought a suit attempting to force their union to collect delinquent payments. This suit was dismissed on jurisdictional grounds and the dismissal was

affirmed by the Circuit Court. Id. at 984. However, while there was absolutely no judicial determination at all or showing of entitlement to relief in the plaintiffs' lawsuit, the Court took note of the fact that three days before the argument on the appeal of the dismissal of the plaintiffs' lawsuit the union filed a complaint against one of the mines. The Court therefore determined that the plaintiffs should be awarded attorney's fees for rendering services which in fact caused the union to change their approach. This case like the earlier discussed cases cited in the legislative history was cited specifically for the fact that attorney's fees should be awarded when an individual vindicates rights without formally obtaining relief. The focus is obviously not upon the legal entitlement to relief, but upon the fact that the lawsuit three days prior to it being finally dismissed on appeal, in fact caused the change in the defendant's practices. In the instant case, in a

similar manner to Honeybrook Mines, the state officials in fact promulgated regulations prior to the upholding of the dismissal on appeal. These regulations specifically addressed the use of hearsay reports based on information supplied by confidential informants in prison disciplinary proceedings. These regulations closely track the minimum procedures which the Circuit Court had specifically stated must be followed if constitutional rights are not to be violated. As a result, Respondent's lawsuit in an almost classic example of the "private attorney general" concept, vindicated not only his own constitutional rights but the rights of all other prisoners who would in the future be subject to Petitioners' procedures before prison tribunals. By doing so in a manner which did not involve the federal court system in direct regulation or oversight of state officials, Respondent's lawsuit beautifully accommodated the concepts of federalism which this Court has recognized as

being of significant importance. Steffel v. Thompson, 415 U.S. 452 (1974) (concurring Opinion of Justice Rehnquist). While it has been argued that attorney's fees should not be awarded for what is allegedly a gratuitous change in policy, this argument ignores what is meant by gratuitous in the context of attorney's fees. Gratuitousness deals with a situation where even though the policies or practices were changed, the plaintiff's claims wre frivolous, unreasonable, or groundless. Lovell v. City Kankake, 783 F.2d 95 at 97 (7th Cir. 1986). In the present case, Respondent's claims of unconstitutionality were not frivolous, unreasonable, or groundless but specifically held to be true.[3]

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[3]While the Amicus Curiae suggests that Respondent has somehow failed to prove that his lawsuit was an important factor in causing promulgation of the regulations, it must be noted that Respondent has continuously sought to have a hearing in which he could offer such proof, however, such hearing was denied by the District Court. The Third Circuit did not hold that

IV. THE COURT WAS CORRECT IN FINDING THAT RESPONDENT COULD BE A PREVAILING PARTY BASED UPON THE DECLARATION OF HIS CONSTITUTIONAL RIGHTS.

The Petitioners argue that because there is no extant case or controversy, Respondent was not entitled to a declaratory judgment and therefore could not be considered a prevailing party. While Respondent, as will be discussed infra, does not agree with this reasoning on declaratory judgments, there is simply no need for this Court to even reach this issue.

As discussed earlier, Respondent was a prevailing party based upon the fact that he succeeded upon a significant issue in the litigation and achieved the very real and important benefit of having his constitutional rights vindicated--a vindication of rights through a specific appellate court ruling which ruling not only could promote the congressional

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Respondent's suit was in fact a catalyst but merely remanded to the District Court for a hearing on this issue.

policy behind Section 1988 but which ruling in fact led to the promulgation of regulations in keeping with the Court's declaration.

There can be absolutely no question that the appellate court had the power to declare the the Petitioners' actions and practices were in violation of the due process clause of the Fourteenth Amendment.

The Petitioners' assertion that Hanrahan v. Hampton, 446 U.S. 754 (1980), would preclude attorney's fees in the present case is simply an inaccurate reading of the holding in Hanrahan. In Hanrahan there simply had been no determination of the "substantial rights of the parties". The reversal of the directed verdict had not involved in any way a vindication of constitutional rights or a declaration of any rights. The Opinion merely found that there was a sufficient factual dispute to avoid the entry of a directed verdict. See, Mantolete v. Bolger, 791 F.2d 784, 787

(9th Cir. 1986) (specifically discussing the limited basis of the holding in Hanrahan); Harris v. McCarthy, 790 F.2d 753, 757 n. 3 (9th Cir. 1986) (same).

As to the power of the Court to declare that Respondent's constitutional rights have been violated, this Court has long held that such a determination is proper where declaratory relief has been requested along with a damage claim. Powell v. McCormack, 395 U.S. 486 (1969); Wolff v. McDonnell, 418 U.S. 539 (1974).

In Powell v. McCormack, supra, Congressman Powell asserted a claim for back pay for the time during which he was not seated in the 90th Congress and also sought a declaration that the House resolution which lead to his not being seated and receiving salary was unconstitutional. The respondents claimed that Powell's claim for declaratory relief should be dismissed as moot since the 90th Congress had been dissolved and

because Powell had been seated in the 91st Congress. The Court's ruling was based soley on the individual claims of Powell and specifically did not address the mootness issue as to other parties. In finding that the claim for back pay and declaratory relief should not be dismissed as moot, this Court stated the following:

> Furthermore, even if Respondents are correct that Petitioner's averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virture of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested, declaratory judgment can then be used as a predicate to further relief.

Id. at 499-500. This Court went on to declare that the House resolution was unconstitutional and remanded the case with instructions to enter a declaratory judgment. This declaratory judgment was permissible because of the still unresolved and hotly contested clearly adverse interests of Petitioner Powell and respondents concerning his wage claim. In Petitioners' cited cases of

Golden v. Zwickler, 394 U.S. 103 (1960), Ashcroft v. Mattis, 431 U.S 171 (1977) (per curiam), Green v. Mansour, No. 84-6270 December 3, 1985), 106 S.Ct. 423 (1985) and Carbolan v. Vaughn, 750 F.2d 662 (5th Cir. 1985), there was simply no question of declaratory relief being requested with an unresolved and hotly contested claim for damages. In Zwickler, not only was there no request for damages, but the record demonstrated that Zwickler's "sole concern" was literature relating to an individual congressman and his record and that it was highly unlikely that this congressman, who had subsequently been appointed a judge, would ever again run for office. There was therefore no claim still unresolved and hotly contested by clearly adverse parties such as exists where a damage remedy is sought. In Ashcroft v. Mattis, the damage claim had been dismissed and therefore the only issue before this Court was whether a petitioner who had no other

claim or interest could seek declaratory relief. The case of Mansour v. Green, supra, is also distinguishable on the basis that no damage relief was sought. Further, in Mansour plaintiffs claimed that the state officials' calculation of benefits under the Aid for Dependent Children Program violated federal law. During the pendency in the District Court, Congress changed some of the relevant provisions of the AFDC Program. There was no argument that this change was the result of the lawsuit. The respondent thereafter brought state policy into compliance with the new federal regulations. While a preliminary injunction was originally granted on one of petitioner's claims, this preliminary injunction was terminated while the matter was pending on the merits. The claims were therefore dismissed because the state's practices were fully in compliance with the federal law. This Court found that the entry of declaratory judgment would be inappropriate since

its only potential purpose was to serve as res judicata for state damage claims and that even if it could potentially so serve, this would be a violation of the principles of federalism and the Eleventh Amendment.[4] The focus of the decision in Mansour was on the Eleventh Amendment which has not even been raised or argued by the Petitioners and is therefore not an issue in this case. The entry of declaratory judgment in Mansour could serve as a predicate to absolutely nothing and there was, therefore, no present dispute between adverse parties such as existed in Powell and other cases where declaratory relief was sought in combination with a claim for damages.

As to the award of attorney's fees for

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[4]As this Court stated "if, of course, petitioners would make no claim that the federal declaratory judgment was res judicata and later commenced proceedings, the declaratory judgment would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason." Id. at _____ U.S. _____, 106 S.Ct. at 428. n. 2.

declaratory relief where asserted immunity exists, there is nothing to indicate that such an award would in any way be improper. In Pulliam v. Allen, supra, this Court specifically allowed an award of attorney's fees against a judge who was absolutely immune from damage relief. In so holding, this Court took specific note of the citation in the House Report of Pierson v. Ray, 386 U.S. 547 (1967), with reference to the passage in the report which states that Congress intended that:

> ...an attorney's fee award be available even when damages would be barred or limited by "immunity doctrines and special defenses available only to public officials." H.R. Rep. No. 94-1558, p. 9 (1976).

Pulliam v. Allen, supra, at 1982. It must be noted that Pierson v. Ray, supra, dealt not only with judicial immunity but also good faith immunity of police officers. It would be an anomalous result if only such liability could exist in a situation of absolute immunity and be

more limited to situations of mere good faith immunity especially when Pierson specifically dealt with both situations.

While Petitioners argue that Kentucky v. Graham, No. 84-849 (June 28, 1985), 105 S.Ct. 3099 (1985) would preclude an award of attorney's fees based upon declaratory relief, Graham can be readily distinguished upon its facts. In Graham, the plaintiffs sought only money damages against the defendants in their individual capacities. The state was not only not a party but had specifically refused to defend any of the individual defendants and refused to pay expenses. The state had in fact been specifically dismissed from the case and was not notified or involved in negotiations which led to settlement. In the present case, Respondent's suit was brought against Petitioners in their official and individual capacities and has specially sought declaratory relief. Further, the state has in

fact been the party litigating this case at all times and never once challenged the official capacity claimed or the declaratory relief sought as being unavailable in this case. While Petitioners also argue that Harlow v. Fitzgerald, 457 U.S. 800 (1982) would prevent the award of attorney's fees, Harlow does not in any way stand for such a proposition and in fact had nothing to do with an award of attorney's fees. On the specific subject of declaratory relief, this Court in Harlow was careful to "emphasize" that:

> We express no view as to the conditions in which injunctive or declaratory relief might be available.

Id. at 819 n. 34. However, as discussed earlier, in the case of Pulliam v. Allen, supra, this Court specifically allowed attorney's fees in a case involving absolute judicial immunity. It should be noted that over the seven-year course of this litigation, it is the state Attorney General who has conducted this litigation

and has satisified an earlier judgment for costs awarded by the Third Circuit. Also, as in Brandon v. Holt, _____, U.S. _____, 105 S.Ct. 873 (1985), this case from its inception was brought against the petitioners in their official capacity and not once has the Attorney General sought to have this suit dismissed as to the official capacity of the claims asserted. In this regard, as this Court noted in Hutto v. Finney, 437 U.S. 678 (1978), allowing the state to avoid liability for attorney's fees "would be a remarkable way to treat individuals who have relied on the Attorney General throughout the litigation." Id. at 692 n. 19; see also, Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1982) (attorney's fees awarded where constitutional violation was found and defendants were acting in their official capacities). As this Court also noted in Hutto, the legislative history of Section 1988 makes it abundantly clear that Congress intended "to authorize fee awards

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payable by the states when the officials are sued in their official capacities." Id. at 693-94. The fact that Respondent specifically sought declaratory relief from the Circuit Court which entered this declaration; the fact that Petitioners did not at any time seek dismissal of the official capacity claimed in this suit; the fact that the Attorney General alone has conducted this litigation throughout its over six-year history; should prevent the state from now arguing that the attorney's fees for this official capacity suit could not be paid by the state but by the individual defendants. Rather, they should be considered to have waived this argument by their participation and conduct over the course of this litigation.

V. IT WAS PROPER FOR THE THIRD CIRCUIT TO AWARD RELIEF BASED SPECIFICALLY UPON THE ENTRY OF DECLARATORY RELIEF.

While Respondent does not feel that this Court need reach the issue of whether a per se declaratory judgment was or could be entered in the present case, Respondent does feel that it would be proper for the Circuit Court to consider its holding as representing, in fact, a declaratory judgment. Declaratory judgments have been recognized as having been entered where not expressly so stated. Solomon v. City of Gainesville, 763 F.2d 1212 (11th Cir. 1985); Solomon v. City of Gainesville, 796 F.2d 1464 (11th Cir. 1986) (attorney's fees awarded for a declaration of unconstitutionality where in fact no declaratory judgment was specifically entered). While Petitioners suggest that the City of Los Angeles v. Lyons, 461 U.S. 95 (1983), would prevent the entry of a declaratory judgment, Respondent submits that a logical reading of this

case in light of Powell v. McCormack, supra., Pulliam v. Allen, supra, and the function of declaratory judgments would indicate otherwise. In Lyons, the damage claim of Respondent had been severed from his claim for equitable relief. Id. at 106. The plaintiff sought injunctive relief which would enjoin the City from using the choke hold policy involved. This Court found that injunctive relief could only be had if the plaintiff demonstrated "a personal stake in the outcome" and that past exposure to illegal conduct did not in itself show a present case or controversy regarding injunctive relief. Id. at 103. There is a reasoned distinction to be made between injunctive and declaratory relief with regard to the issue of case or controversy. An injunction by its nature specifically prohibits future conduct where the plaintiff has demonstrated that he is in immediate danger of suffering future injury. Where it is speculative

that "he will again experience injury as the result of that practice even if continued", the plaintiff does not have a personal stake in the outcome of the decision to prevent a choke hold from being used on other individuals. In contrast, a declaratory judgment as to a continuing policy or practice should not necessitate a finding that the individual immediately might sustain a direct injury since whether or not this in fact is present, the relief, declaration of unconstitutionality, will be precisely the same. If a policy is unconstitutional once, it becomes no less unconstitutional a second time and the "personal stake in the outcome" which assures concrete adverseness is exactly the same. There is in fact nothing speculative about the determination. An injunction in contrast seeks not a declaration but the prohibition of future conduct as it applies to the individual. Therefore, in order for the

individual to have a personal stake in the outcome of the determination, he must be specifically subject to the future conduct. Unlike the declaratory relief involved in Powell and the present case, there is simply no reason to make a determination as to injunctive relief unless the individual will again experience injury as a result of the practice.

Such an approach to a differentiation between declaratory and injunctive relief not only comports with logic but is fully in consonance with this Court's pronouncements on the nature of declaratory relief.

> A declaratory judgment is simply a statement of right, not a binding order supplemented by continuing sanctions.

Steffel v. Thompson, 415 U.S. 452 at 483 (concurring Opinion of Justice Rehnquist). This exact same simple statement of rights occurs where declaratory relief is sought along with damages as well as where declaratory relief is sought without

a claim for damages such as in Steffel v. Thompson, supra. While the basis of the case or controversy which leads to the entry of the declaratory judgment may be different, the case or controversy nonetheless exists and the practical effects of the judgment which arises from the respective case or controversy is exactly the same. Further, such an approach to declaratory relief fully comports with the recognition of federal authority and a "proper balance between state officers engaged in the administration of the state's laws." In both cases the declaration is only persuasive and not coercive and as discussed earlier, benefits the state by putting it on notice of a violation and allowing it to voluntarily pursue the relief which the state feels is appropriate.

> All these possible avenues of relief would be reached voluntarily by the States and would be completely consistent with the concepts of federalism discussed above.

Steffel v. Thompson, supra at 485.

Yet, despite the fact that the declaratory relief involved in the present case functions in exactly the same way as declaratory relief in a class action, concerning the same practices, the Petitioners would urge this Court to require the institution of class actions and the seeking of injunctive relief in order to make the exact same resolution meaningful for purposes of the award of attorney's fees. This approach hardly comports with the manner in which Congress has stated that the courts should apply the provisions of Section 1988.

> In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.

1976 U.S. Code Cong. Ad. News at 5910-11. Such an approach has the substantial negative effect of burdening the court system with unnecessary class

action proceedings[5] and supervision and with requiring a greater intrusion through injunctive relief unto the state's administration of their laws and regulations, and it adds this burden without any substantial benefit to any of the parties involved.

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[5]In the recent case of Evans v. Jeff D., _____ U.S. _____, 106 S. Ct. 1531 (1986) this Court took note of the fact taht of the 10,757 other civil rights cases filed in the courts, most of which were Section 1983 cases, only 111 were class actions. The Petitioner's approach would require plaintiffs to drastically alter this equation and burden the court with needless hearings upon and determination of the propriety of class actions as well as class action supervision if the plaintiffs desire to obtain counsel to vindicate their consitutional rights. Id. at 1543 n.30

VI. THERE HAS BEEN NO QUESTION PRESENTED TO THIS COURT AS TO THE LIMITATION OF ATTORNEY'S FEES.

Amici curiae, National Governor's Association, et al, has raised the issue that Respondent's attorney fee award should be narrowly limited. Respondent would simply point out that he has never requested attorney's fees except for the significant issue on which he has prevailed. Respondent in fact requested from the District Court attorney's fees for 76 1/4 hours spent in vindicating his rights through a District Court and appellate process. While Respondent recognizes that Petitioners did not raise this issue, Respondent did not want the Court to be mislead into believing that Respondent was seeking to use the attorney's fees award act to obtain any exorbitant fee. Rather, Respondent has in keeping with this Court's decision in Hensley v. Eckerhart, supra, attempted to avoid a second major litigation by confining his fee request to a very limited number of hours.

CONCLUSION

For the above stated reasons, the decision of the Court of appeals for the Third Circuit should be affirmed and case remanded to the District Court for determination of attorney's fees.

Respectfully submitted,

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